Dato' Ting Check Sii v Galaxy Grip Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–111–2005-III (1)
DAVID WONG JC
18 APRIL 2005

Civil Procedure — Action — Commencement — Start of case — Allegations of fraud and forgery by defendant — Defendant alleged plaintiff was holding shares as nominee only — Whether defendant should start their case

The plaintiff was a registered shareholder in the first defendant holding 55 shares of the issued and paid up capital of the company. The 55 shares amounted to 55% of the shareholdings in the first defendant. On incorporation, the plaintiff and the third defendant were appointed the only two directors of the first defendant. On or about 28 June 2005, the plaintiff received a notice of extraordinary general meeting ('EGM') dated 17 June 2005 issued by the second defendant notifying the plaintiff of an EGM to be held on 14 July 2005 to remove the plaintiff as director and to appoint the fourth defendant as director. The notice of EGM was issued upon the requisition of the fourth defendant claiming to hold 60% of the issued capital of the first defendant.

Upon receipt of the notice, the plaintiff started to make inquiries concerning the status of his shareholdings. Not satisfied by the answers given by the defendants, the plaintiff took out this suit and sought against the first, second, third and fourth defendants jointly and severally the following reliefs, inter alia: (1) a declaration that the Form 32A share transfer form and the circular resolution to approve the share transfer, were invalid, null and void and of no effect whatsoever; and (2) a declaration that all acts, deeds or things done by the second, third and fourth defendants or any of them pursuant to the Form 32A share transfer form and the circular resolution were invalid, null and void and of no effect whatsoever. The defendants' defence revolved basically on the sole ground that there was an oral agreement that the plaintiff held the 55 shares as trustee/nominee on behalf of the third defendant. The plaintiff applied for an order that the defendants start their case, which was to prove that the plaintiff was the trustee/nominee of the 55% of the issued and paid up capital of the first defendant for the third defendant pursuant to the oral agreement. The plaintiff submitted that the burden of proving the principal and subsidiary issues fell squarely on the defendants. The defendants however submitted that there were several issues stemming from the plaintiff's statement of claim and since these issues were alleged by the plaintiff it was incumbent on the plaintiff to prove them and hence they should start their case.

Held, ordering the defendants to start first to prove their claim:

(1) The primary issue was whether or not the plaintiff was holding the 55 shares

as trustee/nominee on behalf of the third defendant. There was no dispute that the legal and registered ownership of the 55 shares was with the plaintiff and based on that, there was prima facie evidence before this court that the plaintiff was also the beneficial owner. It was then incumbent on the defendant to dislodge that evidence by proving that there was in fact an oral agreement that the plaintiff was in fact a trustee/nominee for the third defendant. The allegation of an oral agreement was made by the defendant relying on certain pre-signed documents by the plaintiff which he had stated as forgery (see para 11).

(2) The plaintiff's allegations, which were part of the statement of claim, came about only after the plaintiff was served with the requisition of the EGM and from the results of the enquiry made by the plaintiff from the defendant's accountant concerning the status of his shares in the first defendant. The plaintiff was informed that prior to the incorporation of the first defendant, he had pre-signed a blank transfer of his entire shareholding with the clear understanding that the third defendant could transfer the plaintiff's shares whenever and to whoever the third defendant wishes. There was also the existence of a Form 32A and the circular board resolution bearing his signatures. After having sight of those documents, he took out this suit seeking declarations that those documents were invalid on the ground that his signatures on the documents were forged. Those signatures were not attested by anyone. In such a circumstance, there was no doubt that the defendants would be requested to start their case (see para 12).

[Bahasa Malaysia summary

Plaintif merupakan pemegang saham berdaftar dalam defendan pertama memegang 55 saham modal berbayar dan dikeluarkan syarikat tersebut. 55 saham itu berjumlah 55% pemegangan saham dalam defendan pertama. Dalam penubuhan tersebut, plaintif dan defendan ketiga telah dilantik sebagai dua orang pengarah sahaja dalam defendan pertama. Pada 28 Jun 2005, plaintif telah menerima satu notis mesyuarat luar biasa am ('EGM') bertarikh 17 Jun 2005 yang dikeluarkan oleh defendan kedua memaklumkan plaintif tentang EGM yang diadakan pada 14 Julai 2005 untuk melucutkan plaintif daripada pengarah dan untuk melantik defendan keempat sebagai pengarah. Notis EGM tersebut telah dikeluarkan setelah pengambilan defendan keempat yang menuntut memegang 60% daripada modal yang dikeluarkan oleh defendan pertama.

Setelah menerima notis tersebut, plaintif mula bertanyakan tentang kedudukan pegangan sahamnya. Berasa tidak puas hati dengan jawapan yang diberikan oleh defendan-defendan, plaintif telah memulakan guaman ini dan memohon terhadap defendan-defendan pertama, kedua, ketiga dan keempat secara bersama dan berasingan relief-relief berikut, antara lainnya: (1) satu deklarasi bahawa Borang 32A borang pindahan saham dan resolusi pekeliling untuk meluluskan pindahan saham itu, adalah tidak sah, terbatal dan tidak berkuat kuasa; dan (2) satu deklarasi bahawa semua tindakan, amalan atau perkara yang dilakukan oleh defendan-defendan kedua, ketiga dan keempat atau mana-mana daripada mereka menurut Borang 32A borang pindahan saham dan resolusi pekeliling adalah tidak sah, terbatal dan tidak berkuat kuasa. Pembelaan defendan-defendan berkisarkan secara amnya atas satu alasan

A bahawa terdapat perjanjian lisan bahawa plaintif memegang 55 saham sebagai pemegang amanah/calon defendan ketiga. Plaintif telah memohon untuk satu perintah bahawa defendan-defendan memulakan kes mereka, yang mana adalah untuk membuktikan bahawa plaintif merupakan pemegang amanah/calon 55% daripada modal berbayar dan dikeluarkan oleh defendan pertama untuk defendan B ketiga menurut perjanjian lisan tersebut. Plaintif berhujah bahawa beban membuktikan isu-isu prinsipal dan subsidiari terletak atas defendan-defendan. Defendan-defendan bagaimanapun berhujah bahawa terdapat beberapa isu yang timbul daripada penyataan tuntutan plaintif dan memandangkan isu-isu tersebut dikatakan oleh plaintif, ia adalah penting untuk plaintif membuktikannya dan C justeru itu mereka patut memulakan kes mereka.

Diputuskan, mengarahkan defendan-defendan memulakan dahulu untuk membuktikan tuntutan mereka:

D (1) Isu utama adalah sama ada atau tidak plaintif memegang 55 saham sebagai pemegang amanah/calon bagi pihak defendan ketiga. Tiada pertikaian bahawa pemilikan sah dan berdaftar 55 saham adalah plaintif dan berdasarkan itu, terdapat keterangan prima facie di hadapan mahkamah ini bahawa plaintif juga pemilik benefisiari. Adalah wajib ke atas defendan untuk membangkang E keterangan tersebut dengan membuktikan bahawa terdapat perjanjian lisan yang mana plaintif sememangnya pemegang amanah/calon untuk defendan ketiga. Pengataan suatu perjanjian lisan dibuat oleh defendan bergantung kepada beberapa dokumen-dokumen yang telah ditandatangani terlebih dahulu oleh plaintif yang beliau telah nyatakan sebagai suatu pemalsuan (lihat F perenggan 11).

(2) Pengataan plaintif, yang merupakan sebahagian daripada penyataan tuntutan, timbul hanya selepas plaintif disampaikan dengan rekuisisi EGM dan berdasarkan hasil pertanyaan yang dibuat oleh plaintif daripada akauntan defendan berkaitan kedudukan saham-sahamnya dalam defendan pertama. G Plaintif telah memaklumkan bahawa sebelum penubuhan defendan pertama, beliau telahpun menandatangani pindahan kosong keseluruhan pegangan sahamnya dengan pemahaman bahawa defendan ketiga boleh memindahkan saham-saham plaintif pada bila-bila masa dan kepada sesiapa yang defendan ketiga inginkan. Terdapat juga satu Borang 32A dan resolusi pekeliling H lembaga yang mempunyai tandatangannya. Setelah meneliti dokumen-dokumen tersebut, beliau memulakan guaman ini memohon deklarasi bahawa dokumen-dokumen tersebut adalah tidak sah atas alasan bahawa tandatangannya atas dokumen-dokumen tersebut telah dipalsukan. Tandatangan tersebut tidak diakui oleh sesiapa. Dalam keadaan sedemikian, tiada keraguan bahawa defendan-defendan akan diminta memulakan kes I mereka dahulu (lihat perenggan 12).]

Notes

For cases on commencement of action, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 58–70.

Cases referred to

Chong Chee Yan v Germila Sdn Bhd & Anor [2001] 5 MLJ 264 (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 (refd)

Legislation referred to

Evidence Act 1950 s 103
Rules of the High Court 1980 O 35 r 4(1), (2), (6)

George Lo (George Lo & Partners) for the plaintiff.
Lim Heng Choo (William Yeo with him) (Lim & Lim Advocates) for the defendants.

David Wong JC:

INTRODUCTION

[1] This is an application by the plaintiffs counsel for an order that the defendants start their case, which is to prove that the plaintiff is the trustee/nominee of the 55% of the issued and paid up capital of first defendant for the third defendant pursuant to an oral agreement.

[2] The undisputed facts are these. The plaintiff is and always has been a registered shareholder in the first defendant holding 55 shares of the issued and paid up capital of the Company. The 55 shares amount to 55% of the shareholdings in the first defendant which was incorporated on the 21 October 1996. On incorporation, the plaintiff and the third defendant were appointed the only two directors of the first defendant and have remained ever since. On or about 28 June 2005, the plaintiff received a Notice of Extraordinary General Meeting ('EGM') dated 17 June 2005 issued by the second defendant notifying the plaintiff of an EGM to be held on 14 July 2005 to remove the plaintiff as director and to appoint the fourth defendant as director. The notice of EGM was issued upon the requisition of the fourth defendant claiming to hold 60% of the issued capital of the first defendant. The fourth defendant's requisition was also dated 17 June 2005. Upon receipt of the aforesaid notice the plaintiff started to make inquiries concerning the status of his shareholdings. Not satisfied by the answers given by the defendants, the plaintiff took out this suit and sought against the first, second, third and fourth defendants jointly and severally the following reliefs:

(a) a declaration that the Form 32A share transfer form and the Circular Resolution to approve the share transfer, are invalid, null and void and of no effect whatsoever;

(b) a declaration that all acts, deeds or things done by the second, third and fourth defendants or any of them pursuant to the said Form 32A share transfer form and the Circular Resolution are invalid, null and void and of no effect whatsoever;

(c) an injunction to restrain the second defendant from registering the fourth defendant as a member of the first defendant Company;

A (d) an injunction to restrain the defendants from convening any Extraordinary General Meeting to remove the plaintiff as director of the first defendant company and to appoint the fourth defendant or any other person as director;

(e) an injunction to restrain the defendants from howsoever acting upon the purported Form 32A and the purported Circular Resolution;

B (f) an injunction to restrain the second and third defendants from conducting the affairs of the first defendant unless such affairs have been authorised by a duly convened meeting of the directors of the first defendant;

(g) damages as against the second, third and fourth defendants;

C (h) costs; and

(i) any further or other orders or relief as this honourable court shall deem fit.

D **[3]** The defendants' defence revolves basically on the sole ground that there is an oral agreement that the plaintiff holds the 55 shares as trustee/nominee on behalf of the third defendant.

RELEVANT LAWS

E **[4]** They are O 35 r 4 of the Rules of the High Court 1980 ('RHC') and s 103 of the Evidence Act 1950.

[5] Order 35 r 4(1) of the RHC states that:

F ... The judge before whom an action is tried may give directions as to the party to begin and the order of speeches at the trial, and, subject to any such direction[], the party to begin and the order of speeches shall be that provided by this rule...

[6] Order 35 r 4(2) of the RHC states that:

G ... Subject to paragraph (6) the plaintiff shall begin by opening his case...

[7] Order 35 r 4(6) of the RHC states that:

H ... Where the burden of proof of all the issues in the action lies on the defendant or, where there are two or more defendants and they appear separately or are separately represented, on one of the defendants, the defendant or that defendant, as the case may be, shall be entitled to begin, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between, him and the plaintiff as if for references to the plaintiff and the defendant there were substituted reference to the defendant and plaintiff respectively...

I **[8]** Section 103 of the Evidence Act 1950 states as follows:

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

CONTENTIONS OF COUNSELS

[9] The plaintiffs counsel, Mr George Lo, submits in his words as follows:

> In a nutshell, the principal issue before this honourable court is whether there is any truth in the defendants' allegation that there was an oral agreement made between the plaintiff and the third defendant that the plaintiff would hold the 55% share as trustee and nominee for the third defendant. The impugned transfer is merely evidence of such alleged trust or nominee relationship. The subsidiary issue is whether the signature appearing on the transfer belongs to the plaintiff. The burden of proving the principal and subsidiary issues fall squarely on the defendants. See *Utama Merchant Bank Berhad v Dato' Mohd Nadzmi Mohd Salleh* at p 867 para d–g.

[10] For the defendant's counsel, Mr Lim Heng Choo refers to the pleadings and submits that there are several issues stemming from the plaintiff's statement of claim. These issues concern forgery and conspiracy to defraud in respect of the two documents. Relying on O 35 r 4(6) of the RHC and the case of *Chong Chee Yan v Germila Sdn Bhd & Anor* [2001] 5 MLJ 264, he submits that since these issues are alleged by the plaintiff it is incumbent on the plaintiff to prove them and hence they should start their case.

FINDING OF THE COURT

[11] The primary issue in this suit in my judgment is whether or not the plaintiff is holding the 55 shares as trustee/nominee on behalf of the third defendant. There is no dispute that the legal and registered ownership of the 55 shares lies with the plaintiff and in my view based on that, there is prima facie evidence before this court that the plaintiff is also the beneficial owner. It is then incumbent on the defendant to dislodge that evidence by proving that there is in fact an oral agreement that the plaintiff is in fact a trustee/nominee for the third defendant. The allegation of an oral agreement is made by the defendant relying on certain pre signed documents by the plaintiff which he states are forgery. Section 103 of the Evidence Act 1950 provides that if a person wishes the court to believe the existence of a particular fact, the burden lies on him to prove it. An example of the application of s 103 is the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627, where Siti Norma Yaacob JCA (as she then was) at p 635 states:

> ... The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence.
>
> He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that iftfye witness had been produced, his evidence would work against the respondent There is no obligation in law for the respondent to produce the witness as that obligation rests with the Appellant, the party who alleges, and the fact that

the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

[12] In respect of the submission that since it is the plaintiff who alleges forgery and conspiracy to defraud, the burden is on him to prove those allegations and hence he should start this case. With respect, I disagree. Those allegations, which are part of the statement of claim, came about only after the plaintiff was served with the requisition of the EGM and from the results of the enquiry made by the plaintiff from the defendant's accountant concerning the status of his shares in the first defendant. The plaintiff was informed that prior to the incorporation of the first defendant, he had pre-signed a blank transfer of his entire shareholding with the clear understanding that the third defendant could transfer the plaintiffs shares whenever and to whoever the third defendant wishes. There is also the existence of a Form 32A and the Circular Board Resolution bearing his signatures. After having sight of those documents, he took out this suit seeking declarations that those documents are invalid on the ground that his signatures on the documents were forged. Those signatures were not attested by anyone. The defendants of course are relying on the same documents to prove their case. As stated earlier by me, the fact that the 55 shares are registered in the name of the plaintiff is prima facie evidence that he should be treated as the beneficial as well as the registered owner unless proven otherwise and since it is the defendants who allege that there is an oral agreement saying otherwise it is incumbent on them to prove the aforesaid oral agreement. The plaintiff could have very well only pleaded that he is the registered owner of the 55 shares and requested for the declarations as sought here. No doubt the defendants would then allege that there is an oral agreement based on the aforesaid documents. In such a circumstance, there is no doubt that the defendants would be requested to start their case. That scenario is no different to the present case except that the plaintiff because of the discovery of those documents and taking a cautious approach pleaded the reasons why those documents cannot be relied on by the defendants.

[13] Accordingly, I hereby order the defendants to start first to prove their claim that there is an oral agreement that the plaintiff holds the 55 shares as trustee/nominee for the third defendant.

[14] No order as to costs.

Application allowed.

Reported by Loo Lai Mee